November 28, 2022

Comment Intake Mortgage Refinances and Forbearances RFI
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Information Regarding Mortgage Refinances and Forbearances; Docket No. CFPB-2022-0059

To Whom It May Concern:

The Housing Policy Council (HPC)[1] appreciates the opportunity to respond to the Consumer Financial Protection Bureau's (the Bureau or CFPB) Request for Information (RFI) regarding Refinances and Forbearances. Our association is responding to the RFI with two letters, this one focused on Real Estate Settlement Procedures Act (RESPA)/Regulation X loss mitigation rules and the other on streamlined refinances and the Ability-to-Repay/Qualified Mortgage (ATR/QM) regulations. As detailed below, we recommend the Bureau pursue changes to 12 C.F.R. § 1024.41 to update and align the requirements with existing loss mitigation practices, many of which reflect lessons learned during the national pandemic. We also ask that, in the interim, the Bureau reaffirm that the existing Regulation X provisions permit streamlined loss mitigation options to be offered to certain financially distressed homeowners who were not affected by COVID-19.

Our letter is organized in accordance with HPC's policy positions and recommendations and does not attempt to respond to the Bureau's full list of questions in the order or manner in which they were presented in the RFI. Instead, we provide historical context for Regulation X to demonstrate that changes to rulemaking are worthy of consideration and then offer the following recommendations:

[1] The Housing Policy Council is a trade association comprised of the leading national mortgage lenders and servicers; mortgage, hazard, and title insurers; and technology and data companies. Our interest is in the safety and soundness of the housing finance system, the equitable and consistent regulatory treatment of all market participants, and the promotion of lending practices that create sustainable homeownership opportunities in support of vibrant communities and long-term wealth-building for families. For more information, visit www.housingpolicycouncil.org.

(1) The Bureau should consider updating Regulation X to establish a framework that aligns with the common streamlined loss mitigation processes and practices implemented in recent years, and particularly over the course of the pandemic. If the Bureau chooses not to pursue a comprehensive rulemaking, we recommend, at a minimum, a set of targeted changes to the Regulation X loss mitigation rules to establish simplified processes for borrowers facing hardships to access temporary and permanent loss mitigation solutions;
(2) In the interim, the Bureau should issue guidance reaffirming that streamlined approaches for borrowers experiencing certain financial hardships beyond COVID-19 are allowed within the context of the current rules;
(3) The regulation should not be amended to permit or require loss mitigation programs to be offered automatically, without the borrower's consent; and
(4) Regulation X loss mitigation rules should continue to be appropriately focused on specific consumer services and communications, processes, and practices. The statute does not permit, and the associated rules may not and should not be expanded to allow, the Bureau to dictate how private companies engage in commercial decisions regarding the purchase, sale, or transfer of servicing nor the features, terms, or conditions of loss mitigation programs, including affordability measures or demographic targets.

Historical Context: Regulation X Loss Mitigation Requirements Advance Consumer Protections, Not Program Parameters

In promulgating the loss mitigation provisions of Regulation X (12 CFR § 1024.41), the CFPB set national servicing standards that: (1) establish appropriate expectations for loss mitigation processes for borrowers and for owners or assignees of mortgage loans; and (2) ensure that borrowers have a full and fair opportunity to be evaluated for a loss mitigation option before suffering the harms associated with foreclosure.[2]

The CFPB considered two approaches to loss mitigation: (1) establishing processes to facilitate actions by market participants; or (2) mandating outcomes of loss mitigation.[3] The latter approach would involve requiring a servicer to provide a loan modification that would have a positive net present value. The CFPB wisely recognized that such a requirement would impose a complexity and further constrain the investor's discretion to determine the types of programs to be made available and under what circumstances to offer loss mitigation options.[4]

> After careful consideration of … comments, the Bureau has decided to refrain at this time from mandating specific loss mitigation programs or outcomes. The Bureau continues to believe that it is necessary and appropriate to achieve the purposes of RESPA to implement required procedures for servicers' evaluations

[2] Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10695, 10815 (Feb. 14, 2013).
[3] *Id.*
[4] *Id.*

> of borrowers for loss mitigation options and that this approach will maintain consumer access to credit.[5]

The CFPB recognized that loss mitigation programs had evolved significantly since the onset of the financial crisis. The CFPB was concerned that an attempt to mandate specific loss mitigation outcomes would impede innovation, and instead chose to allow such programs to evolve to meet the needs of the market. "The Bureau further believes that if it were to attempt to impose substantive loss mitigation rules on the market at this time, consumers' access to affordable credit could be adversely affected."[6] This policy decision was wise, remains a valid conclusion, and should be maintained. Regulation X should remain focused on ensuring a fair and transparent process rather than one-size-fits-all programs that try to achieve particular borrower outcomes. Further, the CFPB acknowledged:

> [T]he owner or assignee of a mortgage loan has the freedom to establish or authorize any programs it deems appropriate and likewise, to establish or authorize the eligibility criteria for such programs; a servicer is only obligated to provide the borrower a notice stating the results of the servicer's review of the borrower's complete loss mitigation application for the programs established or authorized by the owner or assignee of a mortgage loan.[7]

Maintaining the bright line separation between process and eligibility criteria/features of loss mitigation options is critical.

> At the time of promulgation, the CFPB did not believe that the requirement that a servicer evaluate a borrower for all loss mitigation options available to the borrower will impose onerous application burdens on a borrower, require a servicer to provide confusing or unhelpful communications to borrowers, or frustrate borrowers that, in theory, may only wish to obtain an evaluation for a specific type of loss mitigation option.[8]

Unfortunately, this has not proven to be the case. As the Bureau has recognized, the burden of completing an application does deter customers in crisis situations from seeking assistance. Further, the Bureau's novel guidance indicating that a request for a forbearance constituted an incomplete loss mitigation did, in fact, lead to customer confusion and anxiety. Not all customers who request forbearances intend to apply for more long-term loss mitigation programs when they are able to reinstate their loans upon the conclusion of the forbearance plan. Regulation X, however, requires servicers to send letters referring to an "incomplete loss mitigation application" and requesting additional information. These letters simply do not make sense in the context of the customer's actual request for a temporary forbearance (which is

[5] *Id.* at 10817.
[6] *Id.*
[7] *Id.* at 10827.
[8] *Id.* at 10827.

included as its own type of loss mitigation option at the Official Interpretation of "loss mitigation application" within § 1024.31), and many customers were unnecessarily confused by them.

Piecemeal Updates Relied on Exceptions

Since the initial implementation of Regulation X, the CFPB has made piecemeal updates, establishing exceptions to the loss mitigation procedures – a strong indication that a comprehensive review of and revisions to the loss mitigation provisions is appropriate.

In general, servicers cannot evade the requirement to evaluate a complete loss mitigation application for all loss mitigation options available to the borrower by making an offer based upon an incomplete application (the anti-evasion requirement).[9] Originally, the only exception to the anti-evasion requirement allowed a servicer, who had exercised reasonable diligence in obtaining documents and information to complete a loss mitigation application, to offer a borrower a loss mitigation option based on its evaluation of a loss mitigation application that remained incomplete for a significant period of time. Over the last nine years, in response to concerns raised by the industry and consumer advocates, and developments in loss mitigation, the CFPB added four more exceptions to this anti-evasion requirement.

Shortly after finalizing the 2013 Regulation X rule, the CFPB modified the anti-evasion requirement to allow servicers to offer short-term forbearance to borrowers based on a review of an incomplete loss mitigation application. This was in response to both industry and consumer advocates raising questions and concerns about how the rule applies in situations in which a borrower needs and requests only short-term forbearance, for example, after a natural disaster, until the borrower submits all information necessary for evaluation of the borrower for long-term loss mitigation options.[10] The CFPB revised the rule to facilitate "appropriate use of short-term payment forbearance programs without creating undue risk for borrowers who need to be evaluated for a full range of loss mitigation alternatives."[11] In 2016, the CFPB expanded this anti-evasion exception to apply to short-term repayment plans.[12]

In response to the COVID-19 emergency, the CFPB created exceptions to the anti-evasion requirement for certain COVID-19 related loss mitigation and loan modification options. First, in 2020, the GSEs announced streamlined application procedures for a payment deferral program available to borrowers in a COVID-19 forbearance plan.[13] Industry

[9] 12 C.F.R. § 1024.41(c)(2)(i).
[10] Amendments to the 2013 Mortgage Rules Under the Equal Credit Opportunity Act (Regulation B), Real Estate Settlement Procedures Act (Regulation X), and the Truth in Lending Act (Regulation X), 78 Fed. Reg. 60381 (Oct. 1, 2013).
[11] *Id.* at 60398.
[12] Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72160, 72245 (Oct. 19, 2016).
[13] A servicer may offer this FHFA COVID-19 payment deferral without collecting a complete Borrower Response Package, so long as the borrower indicates to the servicer that (1) the borrower can afford to resume their normal

stakeholders and consumer advocates raised concerns about the potential conflict with Regulation X and whether servicers could offer this GSE COVID-19 payment deferral using the streamlined application procedures without violating Regulation X's anti-evasion requirement. The CFPB amended Regulation X to explicitly permit servicers to offer loss mitigation options that meet certain criteria based on the evaluation of an incomplete application, and that servicers need not comply with certain other Regulation X requirements once the borrower accepts that option.[14]

In 2021, the CFPB added a new temporary exception to the anti-evasion requirement to permit servicers to offer certain loan modification options made available to borrowers with COVID-19 related hardships based on the evaluation of an incomplete application.[15]

As a result of the piecemeal amendments, the regulation now includes an exemption from the "complete" application for: a) a permanent, yet short-term repayment plan; b) a temporary, but possibly extended, forbearance that assumes the need for a permanent loss mitigation resolution; and c) a set of "streamlined" loss mitigation options that meet a specific set of programmatic conditions.

These multiple rulemakings, and the creation of exception after exception, are strong evidence that the loss mitigation procedures are not working as intended, particularly for consumers facing a hardship and in need of a temporary or permanent accommodation.

Challenges with Core Concepts of Regulation X Loss Mitigation Rules

We want to highlight HPC's concerns with terminology and concepts that influence the interpretation and application of Regulation X in ways that are inconsistent with existing loss mitigation practice and the objectives of the regulation. The two areas of concern are: a) the foundational concept of a "complete" application, which serves as the trigger for various consumer protections and requirements; and b) the categorization of forbearances and repayment plans as "short-term" loss mitigation options.

The regulation establishes the concept of a "complete" application as the basis for various requirements and consumer protections. The "complete" vs. "incomplete" application framework triggers additional obligations regarding how a servicer must (among other things) inform a consumer what information is needed to perform the eligibility evaluation, what the servicer must do to collect this information and in what time frame, how this information may be used for an approval or denial of loss mitigation, and how a consumer may appeal a denial. At its core, the terminology and construct of a complete application is inconsistent with loss

monthly payments due before the forbearance; and (2) the borrower cannot afford full reinstatement or a repayment plan to bring their mortgage loan current when they exit forbearance.

[14] Treatment of Certain COVID-19 Related Loss Mitigation Options Under the Real Estate Settlement Procedures Act (RESPA) (Regulation X), 85 Fed. Reg. 39055 (June 30, 2020).

[15] Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X, 86 Fed. Reg. 34848 (June 30, 2021).

mitigation programs, which leads to borrower confusion. As determined by investor/insurer guidelines, the loss mitigation process is not an incomplete vs. complete application framework, as Regulation X envisions. Instead, different loss mitigation solutions require different amounts of information. For example, FHA's HAMP always requires a complete borrower response package. By comparison, the GSEs' Flex Modification requires different documentation based on the borrower's circumstances. Finally, FHA's Advance Loan Modification requires no documentation from the borrower, only the borrower's acceptance of the modification offer. In sum, Regulation X's requirements for a complete application, along with the mandated communications on certain timeframes do not align with the most widely utilized loss mitigation programs. This has led to circumstances that the Bureau was actively working to avoid -- "requir[ing] a servicer to provide confusing or unhelpful communications to borrowers, or frustrat[ing] borrowers that, in theory, may only wish to obtain an evaluation for a specific type of loss mitigation option."[16]

The difficulty with "complete" vs "incomplete" terminology is compounded by the CFPB's treatment of what is an "application" under Regulation X. The Official Interpretations to Regulation X state that a "servicer has flexibility to establish its own application requirements and to decide the type and amount of information it will require from borrowers applying for loss mitigation options."[17] Separately, the Official Interpretations state that "if in giving information to the borrower, the borrower expresses an interest in applying for a loss mitigation option and provides information the servicer would evaluate in connection with a loss mitigation application, the borrower's inquiry has become a loss mitigation application." In guidance, the CFPB has limited a servicer's flexibility in determining its own application requirements. For example, in April 2020, the CFPB, along with the other federal financial regulatory agencies, took the position that when a borrower makes a request for a forbearance and affirms the hardship, it constitutes an "incomplete loss mitigation application" for purposes of Regulation X.[18] The result is that servicers, and the borrowers they are trying to assist, are caught in the perplexing and overly-rigid framework of Regulation X. This places numerous requirements on both the servicer and borrower and often leads to borrower confusion and frustration. And, today, in most cases, servicers must then rely on the anti-evasion exceptions to provide relief to a borrower who has submitted an incomplete application.

One final area of confusion and inconsistency stems from the allowance for "short-term" loss mitigation in the form of forbearance or repayment plans. The descriptor "short-term" in the regulation is used to define a repayment plan that allows for the repayment of no more than three months of past due payments and allows a borrower to repay the arrearage

[16] *Id.* at 10827.

[17] 12 C.F.R. pt. 1024, Supp. I, comment 41(b)(1)-1.

[18] CFPB, FRB, FDIC, NCUA, OCC, CSBS, *Joint Statement on Supervisory and Enforcement Practices Regarding the Mortgage Servicing Rules in Response to the COVID-19 Emergency and the CARES Act* (Apr. 3, 2020). While the majority of our recommendations are focused on regulatory changes, we note that as this statement was made in guidance, it could be redacted through guidance.

over a period lasting no more than six months.[19] It is also used for forbearance, designed to allow a borrower to delay or defer monthly payments, over a period of "no more than six months" due to a financial hardship such as unemployment or natural disasters.[20] Yet, over the course of the pandemic, forbearance periods were often extended to twelve months or as long as eighteen to twenty months. Therefore, the use of the word "short-term" is no longer accurate. Further, these programs are not similar in nature; one is a permanent loss mitigation solution and the other is a temporary form of assistance. A repayment plans serves as a permanent solution to resolve delinquency and outstanding arrearages, whereas a forbearance plan is a temporary form of payment relief during a period of missed or reduced payments. Temporary forbearance typically requires a subsequent, permanent loss mitigation solution to resolve the missed payments.

In 2013, the CFPB believed that "the requirement that a complete loss mitigation application contain information required by servicers provides appropriate flexibility to servicers to determine application requirements consistent with the variety of borrower circumstances or owner or assignee requirements that servicers must evaluate and to ensure that individual borrowers are not obliged to provide information or documents that are unnecessary and inappropriate for a loss mitigation evaluation."[21] The CFPB recognized that the applicable owner or assignee should have latitude to establish or authorize any program it deems appropriate and likewise, to establish or authorize the eligibility criteria.[22] However, the construct of incomplete vs. complete application and short-term vs. long-term solutions, along with the associated communications and timing requirements create substantial obstacles that hinder the creation and adoption of loss mitigation programs. Put plainly, a servicer's obligation to comply with the loss mitigation provisions of Regulation X often leads to a confusing and onerous experience for a borrower that is not balanced by a better outcome for that borrower.

The Bureau should consider whether amendments to Regulation X Loss Mitigation Procedures are needed to resolve these concerns.

Given the substantial challenges and inconsistencies that stem from the various amendments to the rules as well as the use of terminology that is no longer accurate, HPC recommends the Bureau consider a comprehensive update to Regulation X. Such an update should eliminate the concept of a complete (and corollary incomplete) application and allow any type of loss mitigation solution to be offered in accordance with the rules established by the mortgage owner or assignee. These entities may permit loss mitigation with full documentation, limited documentation, or no documentation at all. Regulation X should explicitly permit any of these arrangements and have appropriate and consistent consumer protections and communications regardless.

[19] 12 C.F.R. pt. 1024, Supp. I, comment 41(c)(2)(iii)-4.
[20] 12 C.F.R. pt. 1024, Supp. I, comment 41(c)(2)(iii)-1.
[21] 78 Fed. Reg. 10695, 10824.
[22] *Id.* at 10827.

Further, an updated Regulation X should recognize that some forms of assistance are temporary, but loss mitigation that is permanent resolves the delinquency and arrearages. As such, the process requirements regarding when, how, and what a servicer communicates with the consumer should be based on whether the loss mitigation is temporary or permanent. These types of reforms would make the full set of Regulation X rules more relevant and appropriate.

To be clear, HPC agrees with the original intent and expectations of the regulatory provisions– to ensure that: borrowers have the opportunity to be evaluated for a loss mitigation before foreclosure, there is no dual tracking, and the borrower has an opportunity to appeal a loss mitigation determination. However, as a result of the numerous changes over time, the rule has fundamental inconsistencies, and in its current form, the rule makes it difficult for investors/insurers to create new streamlined loss mitigation programs that can otherwise provide efficient relief to borrowers. And, for many borrowers facing hardships, the rule is not working as intended.

We recognize that any required analysis of and subsequent rework to the loss mitigation provisions is a multi-year endeavor. Therefore, we are also providing comments that explore changes that could be made within the existing framework to better assist borrowers and better align with current loss mitigation practices and programs.

(1) Targeted Updates to Incorporate Lessons Learned

The experiences of borrowers and servicers during the COVID-19 emergency, as well as previous natural disasters and emergencies, have proven that certain aspects of Regulation X lead to borrower confusion and unnecessary delay. Regulation X creates unnecessary hurdles when servicers seek to provide borrowers with temporary/short-term payment relief followed by loss mitigation (be they repayment, deferral, or loan restructuring, and assuming additional loss mitigation is needed after such relief) programs that resolve the missed payments. As discussed in more detail above, the Bureau recognized this and issued two rules to address the restrictions presented by Regulation X for borrowers who needed COVID-19 related relief.

In 2020, shortly after the start of the COVID-19 emergency, HPC recommended the CFPB modify Regulation X to provide modified processes for servicers to better assist mortgage borrowers affected by federally declared disasters and emergencies. Now, the lessons learned from the COVID-19 emergency and the regulatory updates that the CFPB had to make to accommodate new loss mitigation options demonstrate that Regulation X needs to explicitly allow for streamlined loss mitigation that is not limited to COVID-19-related exceptions. Therefore, we recommend that the Bureau permanently adopt the changes that were made during the COVID-19 period and explicitly include standard, non-COVID-19 streamlined loss mitigation, with some limited regulatory updates. We are attaching our comments on the COVID-19-related exception regulations here, for reconsideration by the Bureau – for these limited and tailored regulatory updates (see Attachment A).

For example, Regulation X should allow for a smooth transition from temporary to permanent loss mitigation solutions, in accordance with applicable investor/insurer guidelines and individual borrower circumstances, as aligned with best practices learned during the pandemic. This would include communications near the end of the temporary forbearance, including, if aligned with investor/insurer guidelines, the flexibility to offer a permanent streamlined loan modification solution prior to or upon the completion of the temporary term. That communication also would include the option for the borrower to submit a complete application to be evaluated for other loss mitigation options. Additionally, if the borrower does not accept the offer for the streamlined long-term plan, the servicer would resume its due diligence to obtain a complete application for another new loss mitigation program that resolves the missed payments.

Further, the tailored regulatory changes should recognize the difference between a temporary forbearance and a permanent loss mitigation resolution. For example, under the existing rule, a servicer still must send an acknowledgment notice listing all information and documentation required to complete an application for loss mitigation (the 5-day letter) even if the borrower has been offered or is in a temporary/short-term forbearance program. Yet borrowers experiencing a recent job loss or other temporary financial hardship may not be in a position to provide lengthy financial documentation at the onset of a forbearance request and often find the 5-day letter and its references to "incomplete loss mitigation application" and additional documentation requirements confusing. This acknowledgment notice highlights the fact that coupling the *short-term* forbearance request with an *incomplete* application causes significant borrower confusion, has little redeeming benefit, and assumes a permanent loss mitigation program is necessary, which is not always true.

Finally, the rule should expressly permit a servicer to offer, and a borrower to accept, a loss mitigation solution without an evaluation of whether the borrower is eligible for other solutions. If there is a loss mitigation option that is at the top of the investor's hierarchy or waterfall, the borrower is eligible for that option, based on the investor's eligibility requirements, and the borrower accepts the option, that should conclude the loss mitigation process. There should be no need or requirement to obtain additional documentation or evaluate the borrower for other possible loss mitigation solutions. If the borrower does not accept that option, the borrower will be given the option to submit a loss mitigation application to determine eligibility for other possible solutions. Amending the rule to provide for this path is in the best interest of the borrower and aligns with insurer/investor guidelines.[23]

[23] We also believe revisions to sections 1024.41(f) and (g) are needed to give servicers sufficient time both to process the forbearance request (as well as any other loss mitigation requests or applications received), and to notify foreclosure counsel/trustees to suspend their processes for either first notices/filings, motions for foreclosure judgment or order of sale, or conducting sales themselves. As these provisions are currently stated, they may be interpreted as requiring immediate, same-day holds that are impossible to consistently implement for all loss mitigation requests.

(2) CFPB Should Issue Interim Guidance – Reaffirm Interpretation of Existing Rules

The Bureau is aware that, beyond the COVID-19 emergency, the GSEs, FHA, VA, USDA, and private investors have long-standing loss mitigation programs that assist borrowers with various types of unexpected hardships, such as job loss, death, divorce, or a natural disaster. These entities require today or have indicated an interest in updating their programs to allow servicers to offer streamlined loss mitigation options, both temporary and permanent, to provide the broader array of borrowers with the relief they need.

Although our members greatly prefer the predictability and durability of further rulemaking, we believe that certain provisions of Regulation X, specifically §§ 1024.41(c)(2)(v) and (vi), are reasonably interpreted to allow servicers to offer streamlined deferrals and modifications to borrowers with non-COVID-19 related hardships if the options are also "made available" to borrowers with such hardships. The regulation does not require as a criterion that the individual borrower offered the loan modification has experienced a COVID-19 related hardship.[24] Therefore, so long as the investors make streamlined modifications and deferrals available to borrowers with COVID-19 hardships, they can also make these options available to borrowers with other hardships. We note that these subsections are not set to expire and are not dependent on the existence of a national emergency.

There are compelling policy reasons to apply 12 C.F.R. § 1024.41(c)(2)(v) & (vi) to non-COVID-19 hardships. It would harm borrowers and servicers for Regulation X to support two separate loss mitigation portals - one streamlined for COVID-19 related hardships and one not streamlined for non-COVID-19 hardships. Such a system imposes considerable costs on the servicing industry, causes significant confusion for borrowers, and is not flexible enough to accommodate for future emergencies, disasters, and other financial hardships. Instead, so long as investors allow streamlined COVID-19 relief options, the same options should be available for borrowers without COVID-19 hardships. Our reading of 12 C.F.R. § 1024.41 is consistent with the text of the regulation and with the strong public policy of avoiding unnecessary costs to the servicing industry and barriers to loss mitigation for borrowers.

Therefore, we recommend that the Bureau make clear, through an explicit affirmation in written guidance,[25] that the COVID-19 related loss mitigation and loan modification provisions also allow for streamlined options to be available when a borrower is facing <u>any</u>

[24] 86 Fed. Reg. 34848, 34872 ("The loan modification option offered need not be made available exclusively to borrowers experiencing a COVID-19-related hardship to qualify for the anti-evasion exception. A loan modification option can qualify for the anti-evasion exception if it is made available to borrowers experiencing a COVID-19-related hardship as well as other borrowers.")

[25] To be clear, HPC prefers the CFPB engage in rulemaking, as guidance does not provide the same level of legal certainty. However, we understand rulemaking is time-consuming and may not align with the Bureau's priorities. We believe guidance may be appropriate here, based on the language from the preamble, as well as the text of the rule itself.

hardship, as defined by the applicable investor/insurer, so long as the option is available to those facing a COVID-19-related hardship. Said another way, if a borrower is eligible for a streamlined loss mitigation program, based on applicable investor/insurer guidelines, the servicer should be able to offer that program to the borrower. Once a borrower accepts such an offer, the servicer should not be required to comply with the Regulation X requirements related to obtaining a complete application.

(3) Opposition to Automatic / Involuntary Application of Loss Mitigation

HPC does not support automatic temporary/short-term or permanent/long-term loss mitigation solutions, which we define to mean loss mitigation options that are executed without borrower consent. Our members instead believe that one of the key determinants for a successful loss mitigation process is establishing quality contact with the borrower, involving the borrower in making decisions appropriate to his/her situation, and requesting only the information/documentation necessary to provide the appropriate relief based on investor/insurer guidance and the borrower's circumstances.

(4) Opposition to Affordability Requirements or Demographic Targeting

Additionally, the RFI discusses constraints on servicing transfers and potential loss mitigation features, such as affordability measures and targeting for specific populations. As discussed in detail above, the CFPB has long publicly held that the role of the loss mitigation provisions in Regulation X are to establish processes for borrowers and for owners or assignees of mortgage loans and ensure borrowers have a full and fair opportunity to receive a loss mitigation evaluation before foreclosure. The CFPB has previously rejected the adoption of eligibility criteria or mandating outcomes, noting the constraint and limitations that those would place on the mortgage market. The CFPB should continue on this path.

Conclusion

Thank you in advance for your consideration of these comments. We welcome the opportunity to engage further with the Bureau on any of the matters addressed in this letter. Should you have any questions or wish to discuss further, please contact Matthew Douglas at (202) 589-1924 and matt.douglas@housingpolicycouncil.org.

Yours truly,

Edward J. DeMarco
President
Housing Policy Council

Attachment A

HPC Letter to the CFPB RE Regulation X and Disasters Sent on April 28, 2020

April 28, 2020

The Honorable Kathleen L. Kraninger
Director
Consumer Financial Protection Bureau (CFPB)
1700 G Street, NW
Washington, DC 20552

RE: Reg X – Disaster-Related Contact

Director Kraninger:

The Housing Policy Council (HPC) is writing to propose that the Consumer Financial Protection Bureau (CFPB) consider adding a new section to Regulation X that would establish a distinct set of relevant processes for servicers to assist mortgage borrowers affected by federally declared disasters and emergencies.

The experiences of borrowers and servicers during the COVID-19 emergency, as well as previous natural disasters and emergencies, has proven that certain aspects of Regulation X lead to borrower confusion and unnecessary delays when servicers seek to provide borrowers with short-term payment relief. The existing Regulation X requirements mandate multiple communications with financially distressed borrowers who need information on available assistance programs, including how to apply, how to submit the necessary documentation, and expected timeframes.

In contrast, borrower access to short-term payment relief in connection with a natural disaster is much simpler, and does not require an application process and evaluation of documents to qualify, like a traditional loan modification. With COVID-19 emergency assistance, borrowers need only attest, orally or otherwise, to a hardship. For natural disasters, as well, the eligibility for short-term assistance has been similarly streamlined, with little to no documentation. Under the circumstances, the current multi-step Regulation X requirements create borrower confusion, providing information that conflicts with the relief being offered (and often already received). Further, the number of notification and contact requirements that are out of synch with the actual short-term relief process also cause delays and redirect critical staffing resources to impractical, unnecessary communications efforts.

We appreciate that the CFPB and other financial services regulators have issued temporary COVID-19 guidance and Frequently Asked Questions (FAQs), emphasizing the

importance of "good faith efforts" to comply with the Reg X is helpful, and we commend the CFPB and other regulators for being responsive to the industry.

However, a more effective and permanent approach would be for the CFPB to establish separate processes and procedures under Reg X, designed to ensure that borrowers affected by a disaster or emergency receive appropriate and relevant communications from their servicers to access immediate relief.

Our proposal ("Disaster-Related Contact") would be a new section in the regulations that would permit servicers to use an optional, alternative approach to contact borrowers, efficiently provide emergency assistance, and communicate relevant information throughout the relief period. By making it optional, Reg X would provide flexibility to allow servicers to develop new, streamlined processes to assist affected borrowers, or to maintain existing processes, and conform them in accordance with supervisory guidance, if they are unable to develop new processes.

As detailed in the attached table, if certain conditions are met, the Disaster-Related Contact provisions would apply rather than the early intervention requirements of 12 C.F.R. § 1024.39 and the loss mitigation procedures of 12 C.F.R. § 1024.41. Instead, the borrower would receive important information at critical times – at the beginning of the short-term payment relief and prior to the end of that relief. Additionally, during or at the end of the short-term relief, the borrower may be provided the option of a pre-approved long-term loss mitigation option that would not require an application or documentation or the option to submit a full loss mitigation application for evaluation under 12 C.F.R. § 1024.41. Finally, it is important to note that while the borrower is in this short-term payment relief accommodation, the servicer would be prohibited from proceeding with a foreclosure action.

The attached table provides details on our Disaster-Related Contact proposal and compares it to the existing requirements under Regulation X, as well as the regulators' supervisory guidance and FAQs related to the COVID-19 emergency and the CARES Act. We welcome the opportunity to discuss this with you and your staff. Please do not hesitate to call Meg Burns, SVP for Mortgage Policy, at 202-589-1926.

Yours truly,

Edward J. DeMarco

Edward J. DeMarco
President
Housing Policy Council

Comparison of Early Intervention/Loss Mitigation Reg X Requirements, COVID-19 Supervisory Guidance, and Proposed Disaster-Related Contact Requirements Revised 6-2-20

Existing Reg X Requirement	Supervisory Guidance Related to COVID-19/CARES Act	Proposed Disaster-Related Contact Requirement	Rationale
Scope/Purpose/Applicability Early intervention requirements (1024.39) apply to delinquent borrowers (in general, live contact no later than 36th day of delinquency and again no later than 36th day after each payment is due as long as delinquent, and written notice no later than 45th day of delinquency). Loss mitigation requirements (1024.41) apply if a servicer receives a loss mitigation application. If a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer must review to determine whether it is complete, provide acknowledgment notice, evaluate the borrower for all loss mitigation options available (if complete app), and provide written notice of the servicer's determination of which loss	Agencies recognize the serious impact of COVID-19 emergency may have on consumers and the operations of servicers. The agencies recognize that there is a potential for consumer confusion about how to seek help or how to respond to some of the options that servicers may be offering at this time. To ensure that servicers have the capacity to offer short-term options and continue their work to assist struggling consumers without further straining their operational capacity or potentially confusing consumers in these programs, the agencies are issuing this joint statement to inform servicers of the agencies' flexible supervisory and enforcement approach during this emergency regarding certain consumer communications required by the mortgage servicing rules.	If a servicer may grant or has granted a borrower affected by a natural or declared disaster or emergency "short-term payment relief" (as defined below) based on a representation by the borrower that the servicer does not confirm through independent due diligence, this separate procedure regarding borrower contact ("Disaster-Related Contact") would apply, at the option of the servicer. Moreover, this Disaster-Related Contact procedure would apply regardless of whether the borrower is delinquent when the servicer grants the borrower short-term payment relief. A natural or declared disaster or emergency is a federal Major Disaster Declaration or Emergency Declaration.	Reg X loss mitigation rules establish procedures that servicers must follow to evaluate borrowers that apply for loss mitigation. Often during a natural or declared disaster or emergency, such processes, while intended to ensure a borrower's application is properly evaluated, often lead to unnecessary delays and borrower confusion. The existing requirements also do not easily conform to the typical short-term hardship that borrowers experience due to a natural or declared disaster or emergency. Separate processes and procedures are needed to ensure that borrowers are receiving accurate information about the actual emergency assistance available, are in contact with their mortgage servicer, and know what to expect over the course of their temporary hardship and how to

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mitigation options, if any, it will offer to the borrower.			resolve/conclude their reliance on special assistance
Early Intervention/ Live Contact with Delinquent Borrowers (1024.39(a)) A servicer must establish or make good faith efforts to establish **live contact with a delinquent borrower no later than the 36th day of a borrower's delinquency** and again no later than 36 days after each payment due date so long as the borrower remains delinquent. Promptly after establishing live contact with a borrower, the servicer must inform the borrower about the availability of loss mitigation options, if appropriate. If the servicer has established and is maintaining ongoing contact with the borrower under the loss mitigation procedures under 1024.41 (defined to include contact during the borrower's completion of a loss mitigation application, the servicer's evaluation of a	The Agencies do not intend to take supervisory or enforcement action against servicers for delays in establishing or making good faith efforts to establish live contact with delinquent borrowers, provided that servicers are making good faith efforts to establish live contact within a reasonable time. If a servicer has established and is maintaining ongoing contact with a borrower under the loss mitigation procedures in 1024.41(c)(2)(iii) related to offering a borrower a short-term payment forbearance program or short-term repayment plan based on the evaluation of an incomplete application, the servicer does not need to comply with the live contact requirements.	If a borrower is eligible for a short-term payment relief accommodation or is already receiving such an accommodation, there would be no live contact requirement. Instead, contact between a servicer and borrower may include, but not be limited to, telephonic, written, or electronic communications and inbound and outbound contact options are permissible. A short-term payment relief accommodation is defined as a short-term (a period of no more than six months) accommodation that provides for a monthly payment amount less than the currently scheduled monthly payment (e.g., forbearance program or repayment plan). Servicers can offer multiple successive short-term payment relief accommodations.	If a borrower is already in contact with the servicer regarding assistance or receiving assistance, there is no need for additional contact at this stage. This aligns with the Supervisory Guidance (if a servicer is following 41(c)(2)(iii) (short term program or plan based on incomplete loss mit app), the servicer does not need to comply with the live contact requirements).

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complete loss mit app, or after the servicer has provided a notice stating that the borrower is not eligible for any options pursuant to the rule), the servicer complies with 1024.39(a) and need not otherwise establish or make good faith efforts to establish live contact. Live contact requirements do not apply when a borrower is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment. (Borrower is not considered delinquent).			
Early Intervention/ Written Notice to Delinquent Borrowers (1024.39(b)) A servicer must provide to a delinquent borrower **a written notice with certain information no later than the 45th day of the borrower's delinquency** and again no later than 45 days after each payment due date so long as the borrower	The Agencies do not intend to take supervisory or enforcement action against servicers for delays in sending the written early intervention notice to delinquent borrowers, provided that servicers are making good faith efforts to provide this notice within a reasonable time.	If a borrower is in contact with the servicer about a short-term payment relief accommodation or is already receiving a short-term payment relief accommodation, there would be no early intervention written notice requirement. This would be true even if the accommodation is not designed to bring the borrower current.	If a borrower is already in contact with the servicer regarding assistance or receiving assistance, there is no need for additional contact at this stage. Sending such notice likely would create borrower confusion.

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remains delinquent. A servicer is not required to provide the written notice more than once during any 180-day period. Written notice requirements do not apply when a borrower is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment. (Borrower is not considered delinquent). Notice can be tailored to provide additional information that the servicer determines would be helpful.		Contact between a servicer and borrower may include, but not be limited to, telephonic, written, or electronic communications.	
Reasonable Diligence and Review of Loss Mitigation Application (1024.41(b)(1) and (2)) A servicer must exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application. Servicers may suspend reasonable diligence efforts to	The CARES Act requires borrowers to make a request to the servicer for a forbearance and affirm that they are experiencing a financial hardship during the COVID-19 emergency. **This request and affirmation constitute an incomplete loss mitigation application.**	A borrower requesting a short-term payment relief accommodation is not submitting a loss mitigation application. Therefore, the application review requirements of § 1024.41 would not apply. Similarly, if during, or at the end of, the short-term payment relief accommodation, a servicer determines that a borrower qualifies for a pre-	This avoids the customer confusion on being asked to submit a complete loss mitigation application and provides the borrower time to recover from the disaster/emergency by providing a short-term payment relief accommodation.

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complete a borrower's loss mitigation application while the borrower is performing under a short-term forbearance program until near the end of the program, unless the borrower requests additional assistance. If a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer must promptly upon receipt, review the loss mitigation application to determine if the loss mitigation application is complete.	Reminder of ability to suspend reasonable diligence efforts during short-term forbearance.	approved loss mitigation option, *without documentation from the borrower,* and the borrower agrees to a pre-approved loss mitigation option, the borrower would not need to submit a loss mitigation application and § 1024.41 would not apply. The requirements of § 1024.41 would only apply if, at any time, the borrower chooses to submit a loss mitigation application for evaluation of possible loss mitigation options.	
Acknowledgment of Receipt of Loss Mitigation Application (1024.41(b)(2)) Servicer provides acknowledgment notice within 5 days of receipt of the application, stating whether the application is complete or incomplete. Must be sent even if the borrower has been offered or is in a short-term forbearance program or repayment plan	Agencies do not plan to cite servicers for failing to provide the acknowledgment notice within 5 days of receipt of an incomplete application (whether the servicer receives the incomplete application before or during the forbearance or repayment plan period), provided the servicer sends the acknowledgment notice before the end of the forbearance period, for a short-term forbearance program (or the end	A borrower requesting a short-term payment relief accommodation is not submitting a loss mitigation application. Therefore, § 1024.41 would not apply and there would be no requirement to send an acknowledgment notice. The requirements of § 1024.41 would only apply if, at any time, the borrower chooses to submit a complete loss mitigation	Receipt of an acknowledgment notice causes borrower confusion. It does not assist the borrower in seeking relief and does not provide the borrower with useful information.

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based on an incomplete loan application. (Comment 41(c)(2)(iii)-2).	of the repayment period, for a short-term repayment plan).	application for evaluation of possible loss mitigation options.	
Communications Related to Short-Term Loss Mitigation based on Incomplete Loan Application: Written Notice (1024.41(c)) Servicer must provide written notice stating: (1) the specific payment terms; (2) the duration of the program or plan; (3) that the servicer offered the program or plan based on an evaluation of an incomplete application; (4) that other loss mitigation options may be available; and (5) that the borrower has the option to submit a complete loss mitigation application to receive an evaluation for all available options regardless of whether the borrower accepts the short-term program or plan. Additional language may be included.	Reminder of these requirements and that both of these communications can be tailored to individual borrowers' circumstances.	**Written Notice of Short-Term Payment Relief Accommodation:** Within 10 days (excluding legal public holidays, Saturdays, and Sundays) of offering a short-term accommodation, unless the borrower has rejected the offer, the servicer provides the borrower an electronic or written notice, which may be included in the periodic statement, with details of the short-term payment relief accommodation. This confirmation notice shall state: (i) the amount of each payment due during the accommodation (if that payment amount may change, state that it may change); (ii) the date by which the borrower must make each payment; (iii) whether the mortgage loan will be current at the end of the accommodation if the borrower complies with the accommodation; (iv) that the servicer will contact the borrower prior	This is in line with existing Reg X requirements related to communications to borrowers in short-term loss mitigation programs or plans based on incomplete loan applications. This provides communication at the critical times (the beginning of the program/plan and the end) with key information tailored to the borrower's situation. The notice also would include contact information for dedicated personnel, which is meant to align with the requirements of § 1024.40.

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		to the end of the accommodation with next steps and options; (v) that the borrower has the option to submit a complete loss mitigation application to receive an evaluation for all available options regardless of whether the borrower accepts the short-term program or plan; and (vi) contact information of personnel assigned to the borrower to respond to the borrower's inquiries, and, as applicable, assist the borrower with available loss mitigation options.	

Communications Related to Short-Term Loss Mitigation based on Incomplete Loan Application: Near End of Plan Communication (1024.41(c)) If the borrower remains delinquent near the end of the forbearance program or repayment plan, the servicer must contact the borrower prior to the end of the forbearance period to determine if the borrower wishes to complete the loss mitigation application and proceed with a full loss mitigation evaluation. This contact could be orally or be included as a note on a consumer's regular periodic statement. Additional language may be included.		**Contact Prior to the End of Accommodation:** Prior to the end of a short-term accommodation, the servicer contacts (or attempts to contact) the borrower with information regarding next steps and options. This contact may be orally or in writing, and the information may be included in the periodic statement. If a servicer determines that a borrower qualifies for a pre-approved loss mitigation option, *without documentation from the borrower,* and the borrower agrees to a pre-approved loss mitigation option, the borrower would not need to submit a loss mitigation application and § 1024.41 would not apply. The borrower may choose to submit a complete loss mitigation application for an evaluation for all available	This is in line with existing Reg X requirements related to communications to borrowers in short-term loss mitigation programs or plans based on incomplete loan applications. This provides communication at the critical times (the beginning of the program/plan and the end) with key information tailored to the borrower's situation.

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		options, and, at that time, § 1024.41 would apply. If a borrower completes the short-term accommodation and does not either accept the pre-approved loss mitigation option (if applicable) or submit a loss mitigation application, Reg X and investor-directed requirements would apply.	
Prohibition on Foreclosure Referrals and Sales § 1024.41(f) prohibition on foreclosure referral and § 1024.41(g) prohibition on foreclosure sale.	N/A	A servicer shall not make a foreclosure referral, move for foreclosure judgment or order of sale, or conduct a foreclosure sale while the borrower is in a short-term payment relief accommodation.	This parallels the existing requirements under § 1024.41(f) and (g).
Escrow Analysis § 1024.17(i) requires servicers to submit an annual escrow account statement to the borrower within 30 days of the completion of the escrow account computation year. The servicer must conduct an escrow account analysis before submitting the statement.	The Agencies do not intend to cite in an examination or bring an enforcement action against mortgage servicers for delays in sending the annual escrow statement, provided that servicers are making good faith efforts to provide these statements within a reasonable time. The FAQs restated the exemption available under § 1024.17(i)(2).	A servicer may delay the performance of the escrow analysis under § 1024.17(i) after a reasonable period of time from the conclusion of the short-term payment relief accommodation. The existing exemption for sending the annual statement (1024.17(i)(2)) would continue to apply.	While the existing regulation states the analysis must still be performed, our proposal would provide flexibility on when the analysis is conducted. This would help ensure the analysis is accurate and useful given the short-term payment accommodation.

§ 1024.17(i)(2) provides an exemption from sending the statement if a borrower is more than 30 days overdue, but the analysis must still be performed. If the servicer does not issue the annual statement pursuant to this exemption and the loan subsequently is reinstated or otherwise becomes current, the servicer must provide a history of the account since the last annual statement (which may be longer than 1 year) within 90 days of the date the account became current.			